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91-979

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

ROBERT THOMAS LARSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

QUESTION PRESENTED

Is it a violation of the due process clause of the Fifth and Fourteenth Amendments to the United

States Constitution for the prosecutor to try Petitioner a fourth time after three "hung jury" mistrials.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Robert Thomas Larson and the respondent the State of California.

The respondent before this Court is the State of California.

TABLE OF CONTENTS

QUESTION PRESENTED 1

LIST OF PARTIES 2

TABLE OF AUTHORITIES 5

OPINIONS BELOW 7

JURIDICTION 9

STATEMENT OF THE CASE 13

REASONS FOR GRANTING THE WRIT 21

I. THE ISSUE OF WHETHER TRYING A DEFENDANT A FOURTH TIME AFTER THREE "HUNG JURY" MISTRIALS IS A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION HAS NOT BEEN ADDRESSED BY THIS COURT NOR THE COURTS OF MOST STATES. 21

II. MORE THAN TWO TRIALS VIOLATES THE FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS UNLESS THERE ARE EXTRAORDINARY CIRCUMSTANCES . . . 24

III. THIS COURT SHOULD SET FORTH THE CRITERIA TO BE USED TO EVALUATE THE APPROPRIATENESS OF ANY MORE THAN TWO TRIALS.. 26

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Ake vs. Oklahoma (1985)
470 U.S. 68 [84 L.Ed.2d 53,
105.S.Ct. 1087] 24,25

Arizona vs. Washington (1978)
434 U.S. 497 [54 L.Ed.2d 717,
98 S.Ct. 824] 22

Barker vs. Wingo (1972)
407 U.S. 514 [33 L.Ed.2d 101,
92 S.Ct. 2182 25

Bearden vs. Georgia (1983)
461 U.S. 660 [76 L.Ed.2d 221,
103 S.Ct. 2064 25

California vs. Trombetta (1984)
469 U.S. 948 479 [81 L.Ed.2d 413,
104 S.Ct. 2528] 25

Green vs. United States (1957)
355 U.S. 184, 78 S.Ct. 221,
2 L.Ed.2d 199 22

Moran vs. Ohio (1984)
469 U.S. 948 [83 L.Ed.2d 53,
105 S.Ct. 350 (Mem.) 25

Preston vs. Blackledge (E.D.N.C. 1971)
332 F.Supp. 681 23

United States vs. Agurs (1976)
427 U.S. 97 [49 L.Ed.2d 342,
96 S.Ct. 2392 25

United States vs. Ingram (D.D.C. 1976)

412 F.Supp. 384 23,29

United States vs. Perez (1824)
22 U.S. 579, 6 L.Ed. 165 21

OTHER CASES

State of Hawaii vs. Moriwake (1982)
65 Hawaii 47 [647 P.2d 705] . . 22,26,29

State of New Jersey vs. Abbati (1985)
99 New Jersey 418 [493 A.2d 513] . .
. 23,24,29

State of Tennessee vs. Witt (1978)
572 S.W.2d 513 22

CONSTITUTIONS

Fifth Amendment of the United States
Constitution 1,21

Fourteenth Amendment of the United
States Constitution 1,21

FEDERAL STATUTES

Title 28 of the United States Code,
Section 1257 12

Supreme Court Rules, Rule 17 . . . 12
Penal Code Section 1385 18

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OPINIONS BELOW

The unofficial reports of the opinions below are contained in the appendix as follows:

1. Opinion of the Court of Appeal of the State of California, Second

Appellate District, Division Six, filed May 2, 1991, attached hereto as Appendix A;

2. Order of the Supreme Court of the State of California In Bank, extending time for review, filed July 12, 1991, attached hereto as Appendix B;

3. Order of the Supreme Court of the State of California In Bank, denying review, filed August 14, 1991, attached hereto as Appendix C.

JURISDICTION

The constitutional question of the violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution was raised before and after judgment in the fourth trial. The same issue was raised before the Court of Appeal by way of appeal and Petition for Rehearing. It was raised before the California Supreme Court by way of Petition for Review.

Specifically, counsel for the Defendant raised this issue after the third trial by way of a Motion to Dismiss filed on March 31, 1989, and denied in open court on April 24, 1989.

Petitioner then filed a Petition for Writ of Mandate asserting a denial of due process under the Federal Constitution in the Court of Appeal of the State of California, Second Appellate District,

Division 6, which was denied by order dated July 10, 1989.

Petitioner then petitioned for review asserting a denial of due process under the Federal Constitution before the Supreme Court of the State of California. The Petition was denied, with one dissenting vote, by order entered August 17, 1989.

The matter was then set for trial August 21, 1989; Petitioner appeared at that time and requested a stay of the trial to permit the filing of a Petition for Writ of Certiorari in the United States Supreme Court;

This issue was again raised before judgment in the fourth trial by way of a Motion to Dismiss on the ground that Defendant was denied his rights to due process under the State and Federal Constitutions which was denied on April

24, 1989.

On October 4, 1989, present counsel filed a pleading entitled Notice of Intention to Move for a New Trial and Memorandum of Points and Authorities. Therein counsel for Defendant argued that Defendant had been denied due process under both the United States Constitution and the California Constitution by being tried for a fourth time. The Motion for New Trial which was denied on November 7, 1989.

On appeal, the Defendant raised that "more than two trials violates the federal and state constitutional guarantees of due process and fundamental fairness unless there are extraordinary circumstances" in the Appellant's Opening Brief filed on August 7, 1990.

On June 12, 1990, counsel for Defendant filed a Petition for Review in

front of the Supreme Court of the State of California arguing that allowing the case to be tried for an unprecedented fourth time after three "hung jury" mistrials is a denial of due process of law.

It is respectfully submitted that the federal question presented here was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

Title 28 of the United States Code, Section 1257 and Rule 17 of the Supreme Court Rules confers jurisdiction on the Court.

STATEMENT OF THE CASE

This case arose from an automobile accident which took place in California on August 9, 1987 on Highway 101.

ROBERT THOMAS LARSON was driving his Ford Econoline van along Highway 101 Southbound through San Luis Obispo when he noticed a motorhome ahead of him. He gradually came up upon it. The motorhome was traveling just a bit slower than he was and he decided to change lanes to go past it. He did not pay any attention to the motorhome after he changed lanes and gave it plenty of room. A few minutes later, Mr. Larson heard a bang, went left into the ice plant and then into the Northbound lanes where he hit his brakes. The whole incident took only a few seconds.

In the Northbound lanes, Mr. Larson's vehicle collided with a blue

Chevy Citation occupied by John Walker, Michael Murray and Alan Vandermyden.

Mr. Larson was stunned by the impact. Although severely injured, he undid his seatbelt and was helped to the side of the road. The impact from that collision proximately caused the deaths of John Walker and Michael Murray and injuries to Alan Vandermyden, all occupants of the other vehicle.

At the scene, the paramedic attending to Mr. Larson did not notice an odor of alcohol. Others noticed some odor of alcohol. However, Mr. Larson was coherent.

At about 6:30 p.m. Officer Shelby of the California Highway Patrol came to the emergency room of the hospital and contacted Mr. Larson. The Officer observed that Mr. Larson had an odor of an alcoholic beverage on his breath, that

his eyes were glassy and that his speech was slow and thick. Unknown to Officer Shelby at the time, Mr. Larson had been given demerol at the hospital to relieve pain. The Doctor testified that demerol has a sedative effect and may have caused slower, thicker speech.

Nevertheless, as a result of the observations at the time, Officer Shelby arrested Mr. Larson.

On September 10, 1987, the District Attorney for the County of San Luis Obispo filed a felony complaint in the Grover City Municipal Court within the County of San Luis Obispo. A preliminary hearing was held and the case was eventually tried to a jury in late February and early March of 1988. The jury returned with guilty verdicts on two counts of vehicular manslaughter. However, they were unable to reach a

verdict on the third count of felony drunk driving. The jury was deadlocked nine (9) to three (3) in favor of acquittal on Count III. Nine (9) of the jurors found a reasonable doubt as to the proof of impairment but did not understand that impairment was also an element of the vehicular manslaughter charges.

A Motion for New Trial was filed April 5, 1988, and was eventually granted on June 10, 1988. A mistrial had already been declared as to Count III due to the deadlocked jury and a new trial was granted as to Counts I and II on the basis of the inconsistent verdicts and the fact that the jurors had relied upon the verdict forms rather than upon the jury instructions in order to determine the elements of the offenses.

In July of 1988, the case was

assigned for jury trial. The District Attorney and Defense Counsel announced ready for several days in succession at the Master Calendar call. However, on the first day set for trial, after discussing a number of preliminary matters with the Judge, the District Attorney announced his decision to dismiss and refile the case based on the fact that he had a vacation planned within two weeks. Appellant, through counsel, objected to the dismissal, however, the Court granted the District Attorney's Motion.

The case was then re-filed by the District Attorney's Office in the San Luis Obispo Municipal Court. A second preliminary hearing was held on the transcript of the prior hearing with additional testimony from one witness. Appellant was held to answer and an

Information was filed in the San Luis Obispo Superior Court on October 11, 1988.

The jury trial commenced on December 6, 1988. After lengthy deliberations the jury was deadlocked and on December 27, 1988, the Judge excused the jury declaring a mistrial.[1] Thereafter, the District Attorney announced he was prepared to try the case for a third time. Appellant made a Motion to Dismiss the action on the grounds that he was denied a speedy trial and his rights to due process under the State and Federal Constitutions and that Penal Code Section 1385 was not complied with. Said Motion to Dismiss was filed on January 9, 1989, and was thereafter heard and denied by the Honorable Judge Fredman.

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[1] Juror interviews disclosed that the jury was deadlocked eight (8) to four (4) for acquittal. (C.T. 56)

The case was assigned for a new trial in the Superior Court of San Luis Obispo County, State of California. This third trial commenced on February 27, 1989. After lengthy jury deliberations the jury was once again deadlocked on the charged offenses as well as lesser included. A mistrial was declared and the jury discharged.[2]

On March 31, 1989, Appellant again made a Motion to Dismiss the action on the grounds that he was denied a speedy trial and his rights to due process under the State and Federal Constitutions and on the further ground that Penal Code Section 1385 was not complied with. The motion was denied.

The case was set for a fourth jury

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[2] The Jury was apparently split seven (7) to five (5) one way or the other on the charges alleged in the Information.

trial on August 23, 1989. The jury found Appellant not guilty as to Counts I and II, vehicular manslaughter while intoxicated and not guilty as to Count III driving under the influence causing bodily injury. However, the Jury found Appellant guilty of two lesser included offenses of misdemeanor vehicular manslaughter.

REASONS FOR GRANTING THE WRIT

I.

The issue of whether trying a defendant a fourth time after three "hung jury" mistrials is a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution has not been addressed by this Court nor the courts of most states.

This issue has not been addressed by this Honorable Court nor by the courts of most of the states, undoubtedly because in most cases, the state would dismiss the case after a second or certainly a third hung jury mistrial.

This Honorable Court has determined that one retrial after a hung jury is permissible in United States vs. Perez (1824) 22 U.S. 579 [6 L.Ed. 165], although this Court has also expressed its concern over the unfairness and

potential dangers of retrials. See Green vs. United States (1957) 355 U.S. 184 at 187-188 [2 L.Ed.2d 199, 78 S.Ct. 221]; Arizona vs. Washington (1978) 434 U.S. 497, at 504, [54 L.Ed.2d 717, 98 S.Ct. 824].

The Supreme Courts of three states have squarely addressed the issue and lower federal courts have grappled it.

The Tennessee Supreme Court in State vs. Witt (1978) 572 S.W.2d 913, upheld the dismissal for indictments for murder in the first degree after three hung jury mistrials stating that a fourth trial in that case, "Offends traditional notions of fair play and substantial justice".

The Supreme Court of Hawaii in State vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705] upheld a dismissal after two hung jury mistrials on charges of manslaughter.

And finally, the Supreme Court of New Jersey in State vs. Abbati (1985) 99 N.J. 418 [493 A.2d 513] affirmed the authority of the Court (although reversing and remanding for further hearing) to dismiss charges of first degree kidnapping, first degree aggravated sexual assault and other charges after two hung jury mistrials, resting its decision on fundamental fairness as an integral part of the right of due process under the Federal Constitution.

Lower federal courts have also grappled with but have not decided the issue. See e.g., Preston vs. Blackledge (E.D.N.C. 1971) 332 F.Supp. 681; United States vs. Ingram (1976) 412 F.Supp. 384.

II.

More than two trials violates the federal constitutional guarantees of due process and fundamental fairness unless there are extraordinary circumstances.

The concept of "fundamental fairness" is an integral part of the right to due process Ake vs. Oklahoma (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087].

The Supreme Court of New Jersey specifically recognized that the number of retrials is a matter of "fundamental fairness" which is required by the United States Constitution and the courts of its own state. State vs. Abbati (1985) 99 N.J. 418 [493 A.2d 513]. In discussing the trial court's duty to determine whether or not a third trial should be allowed after two hung juries on first degree kidnapping, first degree

sexual assault and other charges, the Court said:

> "That discretion in the final analysis must be informed and guided by considerations of fundamental fairness, as well as the judiciary's responsibility for the proper overall administration of the criminal justice system." Id.[3]

We respectfully submit that it would be appropriate to follow the rule

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[3]The New Jersey Supreme Court in Abbati cited the following U.S. Supreme Court decisions for the proposition that fundamental fairness is required under the due process clause of the Fourteenth Amendment:
Ake vs. Oklahoma (1985) 470 U.S. 68 [84 L.Ed.2d 53, 105 S.Ct. 1087;
Moran vs. Ohio (1984) 469 U.S. 948 [83 L.Ed.2d 285, 105 S.Ct. 350] (Mem.);
California vs. Trombetta (1984) 467 U.S. 479 [81 L.Ed.2d 413, 104 S.Ct. 2528].
The Court also found that fundamental fairness may "Be considered a penumbral right reasonably extrapolated from other specific Constitutional guarantees." The Court cited:
Barker vs. Wingo (1972) 407 U.S. 514 [33 L.Ed.2d 101, 92 S.Ct. 2182];
United States vs. Agurs (1976) 427 U.S. 97 [49 L.Ed.2d 342, 96 S.Ct. 2392];
Bearden vs. Georgia (1983) 461 U.S. 660 [76 L.Ed.2d 221, 103 S.Ct. 2064].

specifically set forth by the Hawaii Supreme Court in State vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705] that:

> ". . . in most cases, serious consideration be given to dismissing an indictment with prejudice after a second hung jury mistrial."

In other words, unless there are extraordinary circumstances, the State should be given two and only two opportunities to convict a Defendant based on a hung jury mistrial. Therefore, this case should have been dismissed with prejudice both as a part of the inherent power of the Court and as a matter of due process under the State and Federal Constitutions.

III.

This Court should set forth the criteria to be used to evaluate the appropriateness of any more than two

trials.

This Court should set forth specific criteria that can be fairly applied in the state courts to ascertain whether or not a case is the type of extraordinary case that should have gone to a third, let alone a fourth jury trial.

The following factors have been set forth in all the decisions which have spoken to the issue.

(1) the reasons for the prosecutor's decision to reprosecute, including the gravity of the criminal charges and the public's concern for effective and definitive conclusion of criminal prosecutions;

(2) The circumstances of the individual defendant and the impact of a retrial on the defendant in terms of untoward hardship and unfairness;

(3) The number of prior mistrials and the outcome of the juries' deliberations, if known;

(4) The character of the prior trials including length, complexity and similarity of evidence;

(5) The likelihood of any substantial difference in a subsequent trial, if allowed;

(6) The trial court's own evaluation of the relative strength of each parties' case;

(7) The professional conduct and diligence of counsel, particularly that of the prosecutor;

(8) Whether or not the search for truth is impeded by another trial;

(9) The effects on the courts, witnesses and jurors.

Factors "3" through "7" are almost verbatim renditions of the first

five factors adopted by the New Jersey Supreme Court in State vs. Abbati, supra, which in turn were taken almost verbatim from Items 6 through 6 of the Hawaii decision in State of Hawaii vs. Moriwake, supra.

Factor "1" is the factor of the same number in the Hawaii decision and is spelled out in more detail by the New Jersey Supreme Court immediately following their enumeration of the other factors.

Factor "2" follows that discussion in the New Jersey decision and is found in the prefatory remark of the Hawaii Court prior to its enumeration.

Factors "8" and "9" are taken from the discussion of the Federal Court in United States vs. Ingram, supra.

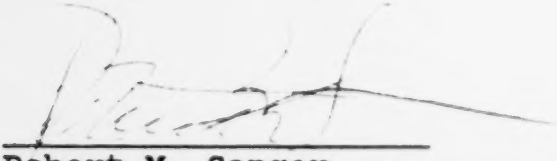
The concept behind the factors listed is to set forth some specific

criteria that can be fairly applied by the courts to ascertain whether or not this case was the type of extraordinary case that should have gone to a third, let alone a fourth, jury trial.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted. If the petitioner is correct in urging that allowing a fourth trial after three "hung jury" mistrials is a violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, the judgment below should be reversed.

DATED: November 11, 1991



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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,	2nd Crim. No. B046345
	Super.Ct. No.CR15062
Plaintiff	San Luis Obispo County
and	
Respondent,	COURT OF APPEAL
	DISTRICT
v.	
	F I L E D
ROBERT THOMAS	
LARSON	May 2, 1991
Defendant	Robert Wandruff, Clerk
and	Deputy
Appellant.	

In a fourth trial, Robert Thomas Larson was convicted by jury of two counts of misdemeanor vehicular manslaughter. (Pen. Code, § 192c, subd.

(2)[1]/, lessor offenses to those charged.) Probation was granted on condition he serve two consecutive 90 day terms in the county jail.

He contends: "I The trial court erred in allowing this case to be tried for an unprecedented fourth time after three hung jury mistrials." "II The trial court committed reversible error in allowing the prosecutor to read the prior testimony of the defendant to the jury as part of his case in chief." "III It was reversible error to allow expert testimony without an adequate foundation." "IV Prejudicial misconduct by the jury requires reversal." "V The evidence was insufficient to support the verdict." "VI The court erred by admitting evidence over objection."

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[1]/ All further statutory references are to this code unless otherwise specified.

"VIII The prosecutor committed repeated misconduct which requires reversal." As no prejudicial error occurred, we affirm.

Appellate was originally charged with two felony counts of driving under the influence causing death (§ 192c, subd. (3)) and one count of driving under the influence causing injury. (Veh. Code. § 23153(a).) The charges arose from the August 9, 1987 "head-on" freeway collision of the vehicle driven south bound by appellant with a northbound vehicle. At approximately 4 p.m. appellant's van left the southbound lanes of the freeway, traveled through the ice-plant landscaped center-divider and struck a car traveling in the northbound lane. The driver and one passenger in that vehicle were killed and another passenger and appellant was seriously injured. A blood alcohol test of

appellant's blood indicated he had a .07 level at 6:45 p.m. An earlier drawn blood sample for hospital purposes showed a .10 percent level at 5:15 p.m. There was expert opinion appellant was under the influence of alcohol at the time of the collision.

In the first trial appellant was convicted of the two felony counts of driving under the influence causing death and the jury was unable to agree on a verdict on the Vehicle Code section 23153, subdivision (a) charge. Appellant successfully moved the court to declare a mistrial and vacated the verdicts on the theory that the jury had misunderstood the instructions requiring proof of alcohol impairment. The case was tried a second and third time, but the jury was

unable to reach unanimous verdicts.[2]/

Prior to the instant trial, appellant unsuccessfully moved to have the case dismissed on the grounds, inter alia, that a fourth trial on the same charges would violate the due process clause of the California and United States Constitutions. (Cal. Const., art. 1, § 7; U.S. Const., 6th & 14th Amends.)

Appellant concedes the former jeopardy clauses provide no bases to prevent a retrial. When a jury is unable to reach a verdict a retrial does not violate the former jeopardy clause. (Richardson vs. United States (1984) 468

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[2]/ The procedural history is taken from facts conceded to be true contained in appellant's motion to dismiss. The record on appeal contains only the clerk's and reporter's transcripts for the instant trial. We do not accept counsel's hearsay statements regarding the number of jurors voting for guilt or acquittal as they are unsupported by any record and were challenged below.

U.S. 317 [104 S.Ct. 3081, 82 L.Ed.2d 242]; People vs. Williams (1987) 195 Cal.App.3d 398, 407.) All three cases relied on by appellant hold that the various trial courts have inherent authority to dismiss a case after successive juries have been unable to reach a verdict. (State of Hawaii vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705]; State of Tennessee vs. Witt (1978) 572 S.W.2d 913; United States vs. Ingram (1976) 412 F.Supp. 384.)

That same discretion to dismiss a criminal case is provided by statute in section 1385 which, in pertinent part provides: "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set

forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

In exercising this discretion the court must consider the interests of society as well as those of the defendant. (People vs. Orin (1975) 13 Cal.3d 937, 945-947.) In People vs. Williams (1981) 30 Cal.3d 470, at page 481 the Supreme Court reiterated the criteria for a proper exercise of discretion under this section in determining whether to dismiss a case rather than to permit a retrial. It held the court must consider the weight of the evidence of guilt, the nature of the crime, whether the defendant is incarcerated during the trial process, the burden of retrial upon the defendant, the likelihood additional evidence will

be presented, and the risk the defendant will escape a proper punishment. (Id.)

In a well-reasoned written decision the trial court here applied those criteria and declined to dismiss. Appellant has failed to demonstrate an abuse of discretion as a matter of law. (See People v.s Jordan (1986) 42 Cal.3d 308, 316) Assuming arguendo that some number of retrials where the prosecution was unable to convince a unanimous jury of the guilt of the accused could constitution a violation of the traditional notions of fair play which underlie the due process clauses, this is not the case.

There was substantial evidence that appellant committed a criminal offense by driving his automobile over the center-divider and into the northbound lanes. Blood tests indicated his alcohol content

was high enough to impair his driving ability. The crimes with which he was charged were serious involving the death of two people and the serious injury to a third. Three is great public concern about the serious risks posed by the drinking driver. (Burg vs. Municipal Court (1983) 35 Cal.3d 257, 263.) Appellant was not incarcerated prior to and during the trials.

Based on the prosecution's opposition to the motion to the motion to dismiss the trial court reasonable concluded additional evidence would be presented on the issue of appellant's guilt. Some of the evidence related to appellant's eating and alcohol consumption prior to the accident bearing on his blood alcohol content at the time of the accident.

The trial court considered the

expense of time, worry, and attorneys fees resulting from the retrial to appellant. Balancing all factors, the trial court indicated: "In this case the balance between the interest of society and that of the defendant falls clearly in favor of society."

Appellant's claim the court erred in permitting the prosecution to use some of appellant's statements during testimony in earlier trials in its case in chief lacks merit. Appellant does not specify the statements he claims were error to admit but challenges instead the admission during the prosecution's case in chief of any statements made by him at earlier trials on the ground it denies him due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the California Constitution.

Appellant cites no authority, nor have we found any, which precludes the People from using a statement made by the accused during a former trial simply because it was testimony in the defense portion of the case.[3]/ Appellant's statements were party admissions and the context in which they were made was necessary for the jury's understanding of them. (Evid. Code, §1220, 356; People vs. Barrick (1982) 33 Cal.3d 115, 131.)

Appellant's claim that the court erred in permitting Gordon Jennings to testify as an expert on accident reconstruction is also without merit. Jennings opined there was not evidence

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[3]/ Appellant relies on Larios vs. Superior Court 91979) 24 CAl.3d 324 and Prudhomme vs. Superior Court (1970) 2 Cal.3d 320. Larios involved a claim of former jeopardy. Prudhomme disallowed a pretrial order for discovery from the defense to the prosecution. Eight applies here.

that a side-to-side collision between appellant's van and a motor home next to him in the slow lane caused appellant to leave the southbound lanes and collide with the decedents' vehicle. Appellant did not specifically object on this ground below which is waived on appeal. (Evid.Code, § 353.) Appellant's objection below was of no "adequate foundation" for Jennings' opinion regarding the cause of the flat tire on appellant's van found after the collision. Appellant also objected that Jennings had never studied driver's reactions to rear end collisions specifically to permit him to render an opinion on that. Assuming arguendo these objections were sufficient to apprise the court of the present objection, there was no error.

Evidence Code section 720 provides in pertinent part: "(a) A person is

qualified to testify as an expert if he has special knowledge, skill, experience, training, or eduction sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, with special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

A trial judge has broad discretion in determining whether to permit a witness to testify as an expert. A ruling permitting such testimony will not be disturbed on appeal unless it clearly constitutes and abuse of discretion. (People vs. Bloyd (1978) 43 Cal.3d 333, 357.) A court abuses its discretion when it rules "in an arbitrary, capricious or patently absorb manner that results in a manifest miscarriage of justice." (People vs. Jordan, supra, 42 Cal.3d at

p. 316.)

Jennings testified that accident reconstruction had been his principal occupation during the previous twelve years. He had qualified as an expert in court three or four times a year during the previous fifteen years and had reconstructed thousands of accidents. He was a member of the Society of Automotive Engineers and had acted as a consultant to the University of Southern California's Institute of Safety. In addition he had taken courses from Northwestern University on the subject, taught classes on the subject, and done independent reading on the subject. He had been a test driver, driven in races, and participated in crash testing to determine how cars react to sideswiping. He had sufficient knowledge and experience to opine whether the accident

had been caused by appellant's van being sideswiped by a vehicle in the inside lane. Furthermore, other witnesses testified the minor dents and marks on the passenger side of appellant's vehicle were caused by driving through trees and brush from which the jury could conclude no contact was made between the motor home and appellant's van. In fact appellant testified and never claimed the motor home actually struck his vehicle.

The basis for appellant's claim of juror misconduct requiring reversal is that juror Paul Burchette failed to disclose to the court and counsel his prior service on driving under the influence cases 30 years earlier while disclosing to other jurors during deliberations that he had such experience and based thereon believed appellant was under the influence of alcohol.

As hearing was held wherein the court found Burchette had failed to disclose this service in response to a general question to the panel as a whole. The court found no prejudice to appellant as Burchette's statements were the kind of common "street information" that persons charged with driving under the influence claim to have had only one or two beers. The court noted appellant was acquitted of driving under the influence and found the misconduct harmless beyond a reasonable doubt. So do we.

The "[i] intentional concealment of relevant facts or the giving of false answered by a juror during voir dire examination constitutes misconduct. [Citation.]" (People vs. Blackwell (1987) 191 Cal.App.3d 925, 929.) However, appellant has failed to show prejudice as a result of this misconduct.

"A judgment adverse to a defendant in a criminal case must be reversed or vacated "wherever

. . . there is a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury." [Citations.]" People vs. Marshall (1990) 50 Cal.3d 907, 950-951; see also People vs. Holloway 50 Cal.3d 1098, 1108-1112.) The acquittal of appellant on the alcohol related offense demonstrates lack of prejudice.

Appellant claims the conversation during trial between Officer Merrill, a prosecution witness, and one alternate and one juror and the opening of doors for jurors by the father of one of the

victims constituted prejudicial misconduct. Assuming arguendo the conduct violated the court's no-contact rules between jurors and trial participants, the record demonstrates no prejudice resulted therefrom.

The court conducted prompt inquiry in each instance and separately questioned the participants. The officer and the jurors all stated the conversation was a purely social one regarding jurors chairs, the courtroom location and whether the officer was exempt from jury duty. The jurors stated it would not affect the assessment of the officer's testimony. The alternate juror did not serve. The father of one of the victims stated he had only once held the doors for any jury and there was no showing any juror knew who he was. We concur with the court's determination

there was no possibility appellant was prejudiced in either instance.

Appellant's insufficiency of the evidence contention is also without merit. We view the entire record to "determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citation.]" (People vs. Bean (1988) 46 Cal.3d 919, 932.) There was evidence from which the jury could reasonably infer the cause of the collision.

Penal Code Section 192c, subdivision (2), in pertinent part, defense manslaughter as the unlawful killing of a human being by ". . . driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." Here appellant veered gradually in a

straight line through the planted center-divider into the northbound lanes and struck the victim's car. There were no signs the brakes were ever applied.

Ms. Sadowski, who helped appellant from his van after the collision, said he stated he was very tired, a complaint he reiterated to an emergency room physician. It was uncontested that appellant, then 70 years old, had been hunting for 3 days prior to the accident. One of his hunting companions said he had fallen asleep after returning from hunting earlier in the day of the collision.

Appellant admitted drinking two or three beers which an expert opined could make a person feel sleepy. Unanimous expert opinion ruled out any tire blowout prior to the collision. Appellant himself said only that he heard a muffled

bang before the van left the southbound lanes. As indicated, Jennings opined that appellant's vehicle was not struck by another vehicle. From the evidence a reasonable jury could conclude appellant, knowing he was tired, drove his van, fell asleep and did not wake up until the collision occurred. This is a substantial evidentiary basis to sustain the convictions. (People v. DeSpenza (1962) 203 Cal.App.2d 283, 287-291.) Appellant's reliance on contradictory evidence is an inappropriate invitation to reweigh the evidence.

We do not address appellant's claims regarding the erroneous admission of evidence over his objection. He claims: "VI B. The transcript of the conditional examination of nurse Nurse was erroneously admitted without a showing of an attempt to effectuate service of

process, C. the court erred in admitting the results of a blood test using the Abbott TDX machine, D. the court improperly allowed statements of the defendant to be admitted which were obtained in violation of Miranda." Contentions (B) and (C) are not addressed because both relate to one of the blood alcohol tests done on the defendant and his acquittal of all charges relating to driving under the influence precludes any prejudice from the rulings even if erroneous. (People v. Watson (1956) 46 Cal.2d 818.)

We do not address appellant's contention that the questioning of appellant at the hospital after the collision but before his arrest by California Highway Patrol Officer Shelby violated his rights under Miranda v. Arizona (1966) 384 U.S. 486 [16 L.Ed.2d

694]. Even assuming appellant's in limine motion to exclude the testimony regarding his statement about his speed and his alcohol consumption without further objection during trial is sufficient to preserve the issue on appeal (but see People v. Boyer (1989) 48 Cal.3d 247, 270, fn. 13), appellate review. The motion in limine was made based on Shelby's testimony at the third trial. That has therefore waived the claim of error. (In re Kathy P. (1979) 25 Cal.3d 91, 102.)

We note the statements challenged were, at best, admissions. They were cumulative of other evidence including appellant's own testimony. They relate primarily to the alcohol related offense of which he was acquitted. Any assumed error would be harmless beyond a reasonable doubt. (People v. McClary

(1977) 20 Cal.3d 218, 230; People v. Boyer, supra, 48 Cal.3d at pp. 279-280, fn. 23.)

Appellant's final contentions regard claims of prosecutorial misconduct. Most are inadequately raised in the brief in a conclusory fashion by simply referring to pages of the transcript to questions asked by the prosecutor or to his arguments to the jury. It is impossible to determine in these instances what appellant claims is improper about these remarks and what prejudice arose therefrom. These claims of error are deemed to be waived. (People v. Collegri (1984) 154 Cal.App.3d 856, 865; People v. Dougherty (1982) 138 Cal.App.3d 278, 282.)

On several occasions complained of, appellant failed to object. All of the statements and questions apparently

complained of are of the type which an objection and admonition would cure and are therefore waived by a failure to object below. People v. Green (1980) 27 Cal.3d 1, 27-34.)

To the extent cognizable on appeal we find the prosecutor's actions either were no improper or resulted in no prejudicial error. The reference to the photograph, exhibit 16, was to admitted evidence. The question to appellant regarding what he had done on the Friday before the collision did violate the court's ruling precluding evidence of appellant's activities before 4:00 a.m. on the day of the offense. However, no prejudicial response was received. The question was designed simply to sho appellant had commenced his hunting trip that day, which was in evidence from other witnesses.

Appellant's claim that the prosecutor referred to facts outside the record relate to the testimony of Sydney Hoffman, an expert who testified for the defense in the third trial but not in the fourth one. To those references to which he never objected, his claim is waived. (People v. Ghent (1987) 43 Cal.3d 739, 762.) The fact and substance of that testimony was in evidence, however, because appellant's counsel had questioned Mr. Jennings about whether he was aware of Hoffman's testimony about the dents in appellant's car and Hoffman's opinion that a motor home had sideswiped appellant's van. Jennings responded affirmatively. The court informed the jury it was their duty to determine which facts were true and instructed them that statements of counsel were not evidence. (See CALJIC

1.02.) No possible prejudice could have flowed from this exchange.

Appellant is correct that the prosecutor stated his personal belief in certain facts and in appellants's guilt. Appellant objected on all but one occasion. It is well established that it is misconduct for the prosecutor to state his or her personal belief in the guilt of the accused. (People v. Bain (1971) 5 Cal.3d 839, 847.) The danger of such improper references is " 'where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other then evidence adduced at trial.' [Citation.]" (People v. Adcox (1988) 47 Cal.3d 207, 236.)

Here, However, at each place in the transcript referred to by appellant the prosecutor linked his statement of belief

to evidence adduced at trial. The prosecutor apologized for the use of the term "I" and explained to the jury his intent was merely to sho them which evidence should convince them of appellant's guilt of the charged offenses. No reasonable juror could conclude that suppressed evidence was the basis of the belief to appellant's prejudice.

The prosecutor's argument that, "It is your job to take the words and the definition of 'impairment,' the expectations of society, and apply them to these facts" does not constitute an appeal to passion and prejudice. It is the duty of jurors to apply the law to facts adduced at trial to determine whether the accused is guilty of an offense.

The judgement is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

STONE, P. J.

GILBERT, J.

William R. Fredman, Judge

Superior Court County of San Luis Obispo

Robert M. Sanger, for Defendant and Appellant.

John Van de Kamp, Attorney General; Richard B. Iglehart, Chief Assistant Attorney General; Edward T. Fogel, Jr., Senior Assistant Attorney General; Keith H. Borjon, Supervising Deputy Attorney General; Donlad E. De Nicola, Deputy Attorney General, for Plaintiff and Respondent.

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SECOND APPELLATE DISTRICT
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Re: The People of the State
VS.
Larson, Robert Thomas

2 Criminal B046345
San Luis Obispo No. 15062

APPENDIX B

SUPREME COURT
F I L E D
JUL 12 1991
Robert Wandruff Clerk
Deputy

Second Appellate District, Division Six,
No. BO46345
So21512

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, RESPONDENT

v.

ROBERT THOMAS LARSON, APPELLANT

The time for granting or denying review in the above cause is hereby extended to and including September 12, 1991, or the date upon which review is either granted or denied.

Chief Justice

APPENDIX C

Second Appellate District, Division Six,
NO.Bo46345
SO21512

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

ROBERT THOMAS LARSON, APPELLANT

SUPREME COURT
F I L E D
AUG 14 1991
Robert Wandruff Clerk

Appellant's petition for review Denied.

LUCAS

Chief Justice